

**6125. Misbranding of Wine of Chenstohow. U. S. \* \* \* v. A. Skarzynski & Co., a corporation. Tried to the court and a jury. Jury unable to agree upon a verdict. Plea of guilty. Fine, \$75. (F. & D. No. 7210. I. S. No. 867-k.)**

On May 19, 1916, the United States attorney for the Western District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against A. Skarzynski & Co., a corporation, Buffalo, N. Y., alleging shipment by said company, in violation of the Food and Drugs Act, as amended, on or about March 20, 1915, from the State of New York into the State of New Jersey, of a quantity of an article labeled in part, "Wine of Chenstohow," which was misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed the following results:

Alcohol (per cent by volume )-----	17.4
Approximate solids (grams per 100 cc)-----	12.58
Ash (gram per 100 cc)-----	.388
Water-insoluble ash (gram per 100 cc)-----	.081
Phosphate pentoxid ( $P_2O_5$ ) (gram per 100 cc)-----	.045
Sodium chlorid (NaCl) (gram per 100 cc)-----	.048
Reducing sugar (grams per 100 cc)-----	9.87
Glycerin (gram per 100 cc)-----	.60
Tartaric acid (gram per 100 cc)-----	.09
Volatile acids, as acetic (gram per 100 cc)-----	.06
Emodin: Present.	
Acidity to litmus (cc N/10 acid per 100 cc)-----	5.25
Alkaloids, ammonia, sucrose, methyl alcohol: Absent.	

It was alleged in substance in the first count of the information that the article was misbranded for the reason that certain statements appearing on its label falsely and fraudulently represented it as a remedy for stomach affections, and as a cure for general debility, loss of strength, indigestion, piles, and pains, when, in truth and in fact, it was not.

On December 18, 1917, the case came on for trial before the court and a jury, and on December 19, 1917, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Hazel, D. J.):

Gentlemen of the jury, an information has been filed in this court by the United States Attorney,—as he had the right to do,—accusing the corporation known as A. Skarzynski & Co., with violating the Sherley Act, so-called, which is an Act passed by Congress for the purpose of prohibiting the sale of impure foods and drugs, and forbidding the misbranding of the same. The evidence on both sides is about to be submitted to you for your consideration and decision, and, in many respects, it is not in harmony, and therefore, I have to remind you that it is your duty to harmonize whatever conflicting testimony there may be, in order to ascertain where the truth rests.

The responsibility of finding the defendant company guilty as charged in the information, or finding it innocent, of course, rests entirely upon you, and my duty is discharged when I have instructed you as to the law applicable to the controversy, leaving you to apply the facts to the law.

As the United States Attorney has very properly said, the case does not lack in importance. Although the statute makes such offense as charged in the information a misdemeanor, it is, nevertheless, an important case, in that violators of this statute cannot be permitted to defraud the public by placing upon the market spurious foods or drugs or beverages, or placing upon the market foods or beverages and mislabeling them, to the end that the buying public may be lead to believe that the contents of the package—if the drug or beverage is contained in packages—contains something different than they intended to purchase.

But the case is also important to the defendant company, for, if you reach the conclusion that there was a misbranding of this commodity, and that the defendant company placed the commodity upon the market with the intention of cheating and defrauding and deceiving the public, then, obviously, the defendant may be somewhat curtailed in its business pursuit, so that you should not lose sight of the fact that the case is not without its importance, and requires, on account thereof your most serious and earnest consideration.

There are several questions of fact that arise from this testimony, which you are required to consider, and one of them is as to the meaning of the words contained on the label upon the bottle in which this commodity was enclosed; are the words on the label or wrapper to be taken in a broad or restricted sense? If they are to be taken in the broad sense, the product in question is misbranded, on account of their evident falsity; if the meaning is restricted, as the defendant claims, to conditions of the stomach as distinguished from organic troubles, and such condition is benefited or cured by the product, then the defendant company is not guilty.

There is another question which you are obliged to consider and determine, if you conclude the product was misbranded and that the label and wrapper were false and intended to mislead, before there may be a conviction in this case, and that is whether the defendant company was aware of the falsity of the wording, or knew it was untrue, and used the wording on the label carelessly and recklessly without sufficiently apprising itself of the true facts, and marketing the product with the view of getting money fraudulently from the public for an article which could not give or render a specified result.

Now, gentlemen, the law does not prohibit a true label or wrapper for this commodity; it does not object to the sale of this product, or to the inclusion of the ingredients specified; the law simply requires that the commodity—this wine in question—shall be properly labeled and branded so as not to deceive.

This is a criminal case, and all the essential elements of the offense, as set forth in the information, are required to be established by the Government beyond a reasonable doubt; and, moreover, the defendant is entitled to the presumption of innocence until you gentlemen have determined what the facts are, and until you have reached the conclusion that the defendant is guilty as charged in the information.

There is no question but that the particular shipment to which the Government objected was a shipment in interstate commerce, and, therefore, this court has jurisdiction of the offense.

Before considering any of these matters to which I have preliminarily alluded, I think it is quite necessary that you should understand with some fullness what the object of Congress was in enacting this law.

In the first place, the object was to prevent the sale of commodities in interstate commerce that are harmful to the health of the people, and to prevent them from being defrauded by adulterated foods, drugs, and liquids, also to prevent the misbranding or false labeling of such articles, so that the buyer should know that the article bought by him was what it purported to be.

The information is not that the product was harmful or injurious to health, or that the label contained a false claim in reference to the place of manufacture; there is no objection on the part of the Government, as I understand its claims, to distinguishing or labeling this wine as the Wine of Chenstohow, inasmuch as the label also contains the explanation that it was manufactured in Buffalo; but, I repeat, the Government insists that the bottles, labels, and wrappers contain reckless expressions or wording which tend to mislead the buyer into believing that he is buying a wine, drug, or beverage that is a remedy or cure for the stomach, or certain conditions of the stomach, appearing on the label.

Now, what was the inscription on the label and wrapper? It has several times been drawn to your attention, but it will not be altogether amiss to have me repeat it, so that you will have it clearly in mind. On the label or wrapper with which the bottle was enclosed were the printed words, "Celebrated Curative Wine of Chenstohow" (to which designation the Government does not object). "Medicinal Compound. The Best Remedy for the Stomach," and on the bottle are the words, "Those who suffer from loss of strength, indigestion, piles, pains, etc., should use the Curative Wine of Chenstohow." There are other words appearing on the label, but they are not essential, and therefore we need not direct your attention to them.

As I have already stated, under this statute under which the information is filed, the word "misbranding" applies to foods, drugs, and liquids, and under

the Sherley Act a package or label containing words or design or figure regarding the article or ingredients contained therein, which is false or misleading in any particular, is a misbranding thereof, and is a false labeling.

In considering this wording on the label and wrapper, it seems to me, the first question for you to consider and determine is the meaning of those words and what the defendant intended the public should understand thereby. Did it mean to have the public believe that the product would remedy and cure those troubles of the stomach, general debility, piles and pains, due to a diseased condition of the stomach, or did it simply mean that the printed words on the label or wrapper, by themselves, or taken together, should be understood as relieving conditions of the stomach, pains, indigestion, general debility, etc., such as do not arise from a diseased condition, or an organic condition of the stomach?

It is for you to determine what the defendant meant by referring to its product as "Curative Wine," "Medicinal Wine," and "Best Remedy for the Stomach," for the conditions and symptoms specified in the label.

In your efforts to reach a proper conclusion, you must have in mind the purpose of this suit is to safeguard the unwary public from being deceived, and from buying such commodity which would not of itself give the benefit promised by the seller, and as indicated by the labels and wrappers.

You should also have in mind the meaning of the words "remedy" and "cure." Those words are to be taken in their ordinary sense, as people in the ordinary walks of life understand them. It, no doubt, was the intention of the defendant to make representations that the public would understand, and, therefore, it did not address doctors, druggists, and chemists, but ordinary folk. The word "remedy" is known to signify something that cures a disease, something taken internally to alleviate disease and benefit the health. I repeat, did the defendant company mean by the wording of the label that the public should understand that the product would remedy or cure all stomach troubles, in the broad sense, which would include organic troubles of the stomach, or did it simply mean to be understood, and want the public to understand by the label and wrapper that the reference was to temporary or symptomatic conditions of the stomach? That is one of the salient questions submitted to you for your decision.

Gentlemen, if you decide that the wording was misleading, and a person would understand thereby that some stomach troubles generally were meant, then the defendant misbranded this commodity, and if the misbranding was to deceive, then the defendant is guilty as charged; if the defendant did it honestly, believing the product would accomplish those ends specified on the label, then it is not guilty.

The Government is required to prove, not only that the commodity was misbranded, as claimed by it, not only that it was too broad and not limited or restricted in its wording, but that it was the intention of the defendant to deceive the public, and that it knew when the branding was appended to the bottle, that it was false. If it was a true label—and you should reach that conclusion from the evidence—and the defendant in good faith marketed the article believing it would remedy the conditions specified in the label and wrapper, then the company obviously is not guilty, and your verdict must be one of "Not guilty."

Now, gentlemen, considerable dispute arose between the experts—men of medical training—as to the wording on the label and wrapper; the witnesses for the Government, Dr. Stockton, Dr. Otto, and Dr. Leonard, testified substantially that there was nothing in the product that would be useful or beneficial for organic stomach troubles, except perhaps for a laxative, as it contained laxative ingredients; that the product had no curative agency whatever except perhaps as to the symptoms of indigestion, which the alcohol might help, or the wine itself might help; that it would not, in their opinions, help or cure any known stomach disease such as comes from cancer, ulcer, dilatation, or reflexaction due to other diseases of the body; while, on the contrary, the testimony of the medical witnesses for the defendant is substantially to the effect that the formula which the defendant's president claimed the defendant used, when the product was administered in specified doses, would afford benefit to the user, and might often remedy the condition of the stomach in their view. I am referring to the testimony of Dr. Marcy and Dr. Heath, that the label does not specify any diseases of the stomach, but merely conditions without the implication of any organic difficulties, and they testified that this product, which admittedly included some medicinal elements, had a curative or remedial effect on the stomach, although they admitted it would not cure the stomach if the

troubles arose from diabetes, ulcers and cancers, but they seemed to think—at least Dr. Heath seemed to think, the product might in such cases often afford some relief. You will remember the testimony, not only that given on behalf of the defendant, but also the testimony for the Government on that point, and it is your duty to harmonize it, and while it is merely opinion evidence, yet, at the same time, it is the opinion of skilled and trained men—trained physicians—who presumably are aware of the effects of medicines on the stomach, and after an examination of the testimony on both sides, give credence to that testimony which appeals to you most.

Now, treating more especially with the defense in this case, you will bear in mind that the witness Skarzynski, who was the president of the defendant company, desires that you should believe that this commodity was put on the market in absolute good faith, and that he did not intend to deceive the public; indeed, he claims broadly that the commodity is not misbranded, and some testimony in substantiation thereof has been given by the doctors as already stated.

He testified that the Wine of Chenstohow is quite celebrated in Poland; that it was originally manufactured by the Paulist fathers; that he obtained his formula for the wine, tonic, or drug which he subsequently manufactured in Buffalo, from a cousin of his, a doctor of some ability, living in Lemburg, Poland, and that he was told, at the time the formula was delivered to him, that it was a remedy for ailments and indispositions and conditions such as are stated on the label. He testified that he has been manufacturing this product in this community about fourteen years; that he never intended that the label should be understood as meaning it to be a remedy for organic troubles such as the Government has specified, and that it was always his idea that the language upon the label should be used in the restricted sense. Of course, it does not matter what his original idea or intention was in that respect; it is for you to determine, from the language itself, what the public would understand by the wording and phrasing contained on the package.

Now, gentlemen, there was some testimony given in reference to a decree that was entered in the United States Court at Chicago, condemning some of the product manufactured by the defendant company, under the Pure Food Law, and a decree was also alluded to in this court, showing or tending to show that the defendant company pleaded guilty here.

The decree of the Illinois court required the defendant to eliminate certain statements from the label, which indicated that the product was a foreign importation, and that it was manufactured by the Paulist fathers. That decree was not a bar to this proceeding; the Government now goes farther than it did before, as it has the right, and says that the labeling was wrong, that it was false, and therefore was a misbranding under the meaning and intentment of the Sherley Act.

There was testimony given by Dr. Hill on behalf of the defendant that the analysis was improper; that it failed to show the various active medicinal agencies contained in the commodity, and Dr. Hill testified that, in his opinion, there was no way of determining what acids there were present in the solution, and that the chemist did not fully determine the total amount of solids that were contained in the preparation.

Gentlemen, these are vital matters that are submitted to you, but, in connection with the testimony of Dr. Hill you, of course, must take into consideration the testimony of Mr. Patton, the chemist, who stated, on rebuttal that the failure to state these various solids made no difference so far as the analysis was concerned.

Your attention is also called to the testimony of Dr. Marcy and Dr. Heath—indeed, I have already alluded to it, but it should be considered in connection with the testimony of Dr. Stockton, Dr. Leonard, and Dr. Otto, all with the view of ascertaining what the truth is as to whether this commodity was misbranded—as to whether the words contained upon the label broadly referred to curing all stomach troubles that the human frame is heir to, or whether they were to be taken in the restricted sense; those matters are to be determined by you from the language itself; you must ascertain what the ordinary significance is of those words.

If you reach the conclusion that there was a misbranding, as I have stated, you must go a step further, and you must examine the testimony with the view of ascertaining whether there was an intention to deceive the public, and if so, then the defendant is guilty as charged in the information.

On the other hand, if you reach the conclusion that there was a misbranding, but there was no intention to foist upon the public this commodity with the

view of gain, then the defendant is entitled to an acquittal on the ground that there was no intention to violate the statute, and without the intention being present there can be no conviction.

Any requests?

Mr. BAIN. No, sir.

Mr. O'DAY. I would like to have the Court charge the jury on the question of intent, that wanton and reckless disregard for the truth is equivalent to an intent to do a thing.

The COURT. Yes.

Mr. O'DAY. I ask the Court to charge the jury that the state of mind—on the question of the intent of the defendant—the state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it, bearing on what he thought or knew of the ingredients, and persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge, and may be held to good faith in their statements?

The COURT. Yes; that is a correct statement of the law.

Mr. O'DAY. I ask the Court to charge the jury, furthermore, that the article alone is not necessarily the inducement and compensation for its purchase, that it is the use to which it may be put, and the purpose it may serve, and there is a disposition to defraud when the article is not of the character or kind represented, and hence does not serve the purpose.

The COURT. Yes.

Mr. O'DAY. I ask the Court to charge the jury that in connection with the word "remedy"—I believe that the Court has already charged that the words should be taken in their usual meaning—that the usual meaning of the word "Remedy," as a matter of law, is that which cures disease, any medicine, the application of which puts an end to disease and restores health.

The COURT. That is what I said before.

Mr. O'DAY. I ask the Court to charge, as a matter of law, that the word "curative" is to be taken in the usual sense, on this bottle and that the usual sense of the word "curative" is that which cures, a remedy.

The COURT. Yes.

Mr. BAIN. In connection with that, I ask your Honor to charge the jury, that another recognized definition of "remedy" is "curative tendency only, and not a guarantee."

The COURT. Yes.

Mr. BAIN. I ask your Honor to charge the jury, that if upon any reasonable hypotheses they can reconcile the evidence with the defendant's innocence, they should acquit.

The COURT. So charged.

The jury thereupon retired, and after due deliberation came into court on December 20, 1917, and reported that they were unable to agree upon a verdict, and were thereupon discharged by the court from further consideration of the case. On March 13, 1918, the defendant company entered a plea of guilty to the information, and the court imposed a fine of \$75.

R. A. PEARSON, *Acting Secretary of Agriculture.*